SUPREME COURT, U. S.

APR 10 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1246

CYNTHIA J. THARAUD and LUCIEN R. THARAUD,
Petitioners,

—against—

CHAUNCEY REAL ESTATE CO. LTD. and SARAH M. STEWART, as Administratrix of Goods, Chattels and Credits of William A. Stewart,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners herein respectfully pray that a writ of certiorari issue in the above-captioned case, directed to the Court of Appeals of the State of New York, to review its order dated and entered in the office of the Clerk of that court on January 12, 1967. (See Appendix B and certified record submitted herewith.)

Opinions Below

There were no opinions in the courts below except the dissenting opinion of Mr. Justice Schwartzwald in the Appellate Term of the Supreme Court of the State of New York, Second Department, which is unreported and is printed in Appendix A hereto.

Jurisdiction

The order of the Court of Appeals, which finally determined this case in New York, was dated and entered January 12, 1967 and is printed in Appendix B hereto. Therefore the time within which this petition for a writ of certiorari might be filed will expire on April 12, 1967. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257.

Nature of Case and Proceedings Below

This is an action brought in Civil Court of the City of New York, Kings County, by respondents on an oral contract relating to real estate services to be rendered by respondents, a corporation and one of its principal officers,* in a New York County Supreme Court stockholders derivative litigation in which petitioner Cynthia J. Tharaud was plaintiff and which involved two basic issues: the sale value and the rental value of certain real estate.

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* W. A. Stewart died pending appeals below and appears as respondent herein by his Administratrix.

The principal issue in this action is whether the corporate respondent earned its money, i.e., whether it performed the terms of the oral contract or whether it breached the oral contract, refused to perform and brought suit before time for performance had expired. Two counterclaims of petitioner Cynthia J. Tharaud are involved, for $6,500. and $7,100., respectively.

The terms, performance and breach of the oral contract and even the parties to it were in sharp dispute before and at the trial. Respondents claimed that each of respondents and each of petitioners were parties to the contract, that the agreed price was $3,500., that respondents performed the contract and that a balance of $3,200. was due. Petitioners, on the other hand, claimed that the contract was between corporate respondent and petitioner Cynthia J. Tharaud who acted through her attorney, her co-petitioner herein, as her disclosed agent, that the terms required performance of services by corporate respondent through to complete conclusion of the derivative litigation including appeals and testimony in the expense proceeding therein, and that respondents breached the contract by refusing to perform and by bringing suit before time for its full performance had expired, i.e., while the derivative suit was still pending, before all appeals were determined and before the testimony in the expense proceeding had been taken.

Petitioner Cynthia J. Tharaud's two counterclaims are respectively (1) for $6,500. against corporate respondent as damages for breach of contract including amounts incurred and paid by her to other persons to do the work under the contract which respondent re-

fused to do and (2) for $7,100. against respondent Stewart for inducing corporate respondent to breach its contract with her.

In the course of the jury trial herein, as the respondents' sole witness, the respondent Stewart, was leaving the stand at the end of respondents' direct case and before any of petitioners' evidence had been presented or heard, the foreman of the jury, an architect, said to Stewart in open court and in the presence and hearing of other jurors,

"You earned your money."

Petitioners' attorneys promptly moved for a new trial on the ground that the jury foreman's remark was grossly improper, evinced prejudice and prejudging of the case before hearing any of petitioners' evidence, and could prejudice other jurors and made it impossible for the petitioners to have a fair trial by an unprejudiced jury. These motions were denied and petitioners were compelled to proceed for the next six days with their case, both in defense and on the counterclaims, at the end of which the same motions were again made and denied.

The trial judge made no attempt at any time during the trial to remove the prejudicial effect of the jury foreman's remark either by admonishing the jury to disregard it or otherwise.

The jury retired for four hours of deliberation and returned a split verdict of 11 to 1 in favor of corporate respondent for $3,200. plus interest and against the petitioner Cynthia J. Tharaud on her counterclaims.

Petitioners' motions to set aside the verdict and for a new trial on the ground that the jury foreman's remark was prejudicial and made it impossible for petitioners to have a fair trial by an unprejudiced jury were denied.

Judgment was entered February 2, 1965 for $4,521.50. Petitioners appealed on the limited ground that they had been deprived of their constitutional right to trial by an unprejudiced jury by the remark of the jury foreman and that a new trial should have been ordered. Although two of the three justices of the Appellate Term of the New York Supreme Court, Second Department, affirmed without opinion, Mr. Justice Schwartzwald, the third justice, dissented in an opinion and voted for reversal and a new trial

> "... upon the ground that the gratuitous comment of the jury foreman to one of the plaintiffs as he was leaving the witness stand that 'You earned your money' was improper and prejudicial under the circumstances." (Appendix A.)

The said Appellate Term unanimously granted petitioners' motion for leave to appeal to the Appellate Division, Second Department, which affirmed without opinion by order of October 24, 1966. Petitioners, by notice dated November 28, 1966 appealed to the Court of Appeals

> "relying solely upon the questions directly involving the construction of Article 1 of the Constitution of the State of New York and Amendment VII of the Constitution of the United States, i.e., whether the defendants were deprived of their constitutional rights guaranteeing them

a fair trial by an unbiased and unprejudiced jury."

Respondents rejected the notice of appeal; the petitioners moved to compel them to accept it and respondents cross moved to dismiss the appeal. On January 12, 1967, the New York Court of Appeals granted, without opinion, the respondents' cross motion on the ground that "no substantial constitutional question is presented". (Appendix B). This is the determination sought to be reviewed by this petition.

Questions Presented

1. In a civil case for breach of contract where plaintiff sues for services rendered and defendant urges that plaintiff did not perform the contract and therefore did not earn his money, if the foreman of the jury in open court at the end of plaintiff's direct case and before hearing any of defendant's evidence, says to the plaintiff, the sole witness, as plaintiff is leaving the stand, in the presence and hearing of other jurors "You earned your money", is not the defendant deprived of his constitutional right to a jury trial by an unprejudiced jury if the trial judge denies defendant's prompt motion for a new trial on the ground that the remark was prejudicial, evinced prejudice, could prejudice other jurors and made it impossible for the defendant to have a fair trial by an unprejudiced jury?

2. Did the New York Court of Appeals err in dismissing the appeal on the ground that no substantial constitutional question was involved when the

Notice of Appeal raised the question whether the jury foreman's remark in open court, in the presence and hearing of other jurors "You earned your money" made to respondents' sole witness, respondent Stewart, as he was leaving this stand at the close of respondents' case, after hearing respondents' evidence and before hearing any of defendants' evidence, was prejudicial, evinced prejudice of the foreman, could prejudice other jurors and deprived defendants of their constitutionally guaranteed right to a fair trial by an unprejudiced jury?

3. Does not the New York Court of Appeals decision seriously impair the right of a litigant to a fair trial by an unprejudiced jury in a civil case?

4. Is not the New York Court of Appeals decision at variance with the law laid down by the New York and Federal courts?

Constitutional Provisions Involved

United States Constitution, Seventh Amendment:

> "In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."

Constitution of the State of New York Article 1, section 2:

> "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; . . ."

How Constitutional Questions Raised

The constitutional questions were raised by affidavit in the trial court, by notice of appeal and by briefs in the Appellate Term, by briefs in the Appellate Division, by notice of appeal and affidavits in the New York Court of Appeals (see certified record submitted herewith, affidavits of L. R. Tharaud, ver. December 7, 1966, pp. 8-9 and Exhibits 6, 7 and 9 and ver. December 29, 1966, pp. 1-2).

The Reasons for Granting the Writ

The right of a litigant, entitled to a jury trial, to trial by an unbiased and unprejudiced jury is fundamental. Trial by a prejudiced or biased jury is no trial at all. This right is just as basic in a civil as in a criminal trial.

Statements made by jurors in open court in the course of the trial which indicate or evince bias and prejudice or prejudgment of the case or statements heard by jurors which may tend to bias or prejudice the mind, taint the jury hearing the case and make it impossible for the parties to receive the constitutionally guaranteed fair trial by an unbiased and unprejudiced jury. As the court, in *Pool* v. *Chicago R. Co.*, 6 Fed. 844 (Circ. Ct., Iowa, 1881), said, p. 850,

> "But where the natural tendency of what a juror does or says or willingly listens to from others is to bias his mind, or where his misconduct evinces a prejudgment of the case, or ill will,

> or passion against the losing party, the inference of prejudice in the true sense inevitably follows, because the verdict cannot be said to be the result of a fair trial. There is no right more sacred than the right to a fair trial. There is no wrong more grievous than the negation of that right."

The court, in *U.S.A.* v. *Clark,* 343 Fed. 2nd 90 (CCA 3rd 1965), said, in connection with a prejudicial statement made in the presence of a jury,

> "The only way that the defendant can be protected against the strong possibility of harm from the improper occurence at trial for which it was in no way responsible is by having a new trial."

Thus, it is plain that even when only the possibility of prejudice exists as the result of an improper statement made in open court in presence of a jury, a new trial should be granted.

In the instant case, the evidence of prejudice was far stronger than a possibility. The jury foreman's statement "You earned your money", made in open court after hearing respondent's evidence and before hearing any of the defendant's evidence, was a statement that the foreman, an architect, felt that the respondent should recover in the case, since the issue in the case was: had the respondents earned their money, i.e., had they performed their contract or had they failed to perform their contract. Moreover, the statement was heard by and could prejudice other jurors. Yet, despite this grossly improper and prejudicial statement, the petitioners' motion for a new

trial on the grounds of prejudice was denied and the petitioners were compelled to present their case for six additional days before a jury the foreman of which had evinced prejudice and as to the members of which there was a strong possibility that prejudice could exist.

Additionally, in the instant case, there was a split verdict by the jury (11-1). Concerning such a circumstance, one New York court said, in *Sheehan* v. *Doyle,* — Misc. —, 152 N.Y.S. 2nd 931 (N.Y. Sup. Ct., N.Y. Co. 1956), at pp. 933-4,

> "The law is too well established to require detailed discussion that a trial juror is required to evaluate the evidence adduced *during a trial* in a completely unbiased manner. . . . *This is particularly true in this case since the verdict of the jury was not unanimous.* . . . In Knickerbocker v. Erie R. Co., 247 App. Div. 495, 286 N.Y.S. 1001, 1002, the court stated: 'It is the cardinal principle of our common law that trial jurors shall be entirely unbiased; and when bias is disclosed, *even after a verdict,* the courts do not hesitate to set verdicts aside. Slater v. United Traction Co., 172 App. Div. 404, 157 N.Y.S. 909; McGarry v. City of Buffalo, 70 Hun 597, 24 N.Y.S. 16.' " (Ital. added)

While the amount of money involved in this case is relatively small, the right of parties to trial by an unprejudiced jury in a civil case guaranteed by the constitution is a right of great substance and importance.

In the present day, when there is properly much concern about congested calendars and about delayed justice being no justice at all, there is a danger that in the desire to achieve speedy justice, fundamental rights may be overlooked. Limiting jury trials, for example, may relieve calendar congestion, but where the basic right to a jury trial constitutionally exists impairment of that right is improper and unconstitutional.

The New York Court of Appeals in an early case said that legislation authorizing a "trial by a jury partial or biased against either party, would be in violation of one of the essential elements of the jury referred to in and secured by the Constitution." (*Stokes* v. *People,* 53 N.Y. 164, 172.) Certainly, a decision by a court approving a trial when the jury is biased or prejudiced is no less in violation of the Constitution than legislation authorizing such a trial.

The decision of the New York Court of Appeals in the instant case that no "substantial" constitutional question is presented must, we submit, have the result of impairing the right of a litigant in a civil case to a fair trial by an unbiased and unprejudiced jury. This right is not only "substantial", it is vital and represents the quintessence of a constitutional right granted both by the United States Constitution, Amendment Seven and the New York Constitution, Article One.

In addition, while petitioners have found no reported federal or New York case with a factual background identical with that involved in the instant case, there is authority in New York and in the federal courts which dictates that the New York Court of

Appeals was in error and that in fact a substantial constitutional question is involved herein and that a new trial should have been granted on the ground that the defendants were deprived of their constitutionally guaranteed right to trial by an unprejudiced and unbiased jury.

In *Lewy* v. *Gillespie*, — Misc. —, 170 N.Y.S. 534 (App. Term 1st Dept. 1918), a suit by plaintiff-attorney for recovery for professional services rendered, a juror asked the plaintiff, during cross examination:

> "A Juror: What are you fighting about, Counsellor? He says all the time that they have no money. Why are you suing for $840., when they have no money?"

The Appellate Term, in reversing the lower court's denial of plaintiff's motion for a new trial on the ground that the remark indicated prejudice, said,

> "It seems to us that the interrogation of the juror in question was so indicative of bias and prejudice on his part as to warrant the conclusion of his inability to give fair consideration of the testimony in the case, and under the circumstances the motion to withdraw a juror should have been granted."

In the instant case, the remark of the jury foreman was far more indicative of prejudice and bias than the remark of the juror in the *Lewy* case. Here the jury foreman's statement "you earned your money" was a plain statement by the juror that the respondent should recover, made before any evidence of the petitioners had been presented.

The federal cases indicating that the New York Court of Appeals decision was in error are:

Pool v. *Chicago R. Co.,* 6 Fed. 844 (Circ. Ct., Iowa, 1881) (quoted and discussed *supra* pp. 8-9)

U.S.A. v. *Clark,* 343 Fed. 2nd 90 (CCA 3rd 1965) (quoted and discussed *supra* p. 9)

Petitioners urge that the right to a jury trial by an unbiased and unprejudiced jury in a civil case is a valuable, basic, and substantial constitutional right, that the right has been violated in the case at bar, and that the right should not be sacrificed but, in view of its importance, should be carefully preserved.

Conclusion

It is respectfully submitted that the constitutional issue herein requires this honorable Court to grant the writ sought.

Respectfully submitted,

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